Sing Pin Jih Pao Sdn Bhd v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL REVISION NO 41-(53)-9-87
MOHAMED DZAIDDIN J
6 MARCH 1990

Provident Fund — Personal liability of chairman — Employer failing to make contributions to Employees Provident Fund — Company convicted and fined — Whether chairman/director of company is personally liable for outstanding contributions — Employees Provident Fund Act 1951, ss 16A(1)(c), A(4) & 18(2)

The petitioner was charged in the magistrate's court for offences under s 16A(1)(c) of the Employees Provident Fund Act 1951, ie being an employer, it failed to pay to the Fund the amount which it is liable under the Act to pay in respect of the employees' contributions. The petitioner was represented at the hearing by its chairman and director, Datuk Lim Kheng Kim, who pleaded guilty to all charges. The petitioner was convicted and fined and Datuk Lim paid the fine. The magistrate also ordered the petitioner to pay a sum of $265,069 being the employees' share of contributions before 15 September 1986 and the employer's contribution of $985,795 by 12 monthly instalments. Part of this sum was paid and the prosecuting officer applied for Datuk Lim to be committed to prison for contempt of court. The magistrate held that Datuk Lim was personally liable to pay the outstanding contributions. The petitioner in this application, applied for revision of the magistrate's order.

Held, allowing the petitioner's application and setting aside the magistrate's order:

Upon the facts of the case, Datuk Lim comes within s 18(2) of the Act and is deemed to be guilty of the offence. However, Datuk Lim was never explained by the magistrate the effect of s 18(2) nor was he given any opportunity to prove to the magistrate that the offence for which he had pleaded guilty was committed without his consent or connivance or that he had failed to exercise his diligence to prevent it. The attention of the magistrate was not drawn to the effect of the condition precedent of this section.

[Bahasa Malaysia summary

Pembuat petisyen telah didakwa di mahkamah majistret bagi kesalahan di bawah s 16A(1)(c) Akta Kumpulanwang Simpanan Pekerja 1951, iaitu sebagai majikan, ia gagal membayar kepada Tabung itu jumlah yang wajib dibayar olehnya di bawah Akta itu bagi sumbagangan pekerja-pekerja. Pembuat petisyen diwakili di perbicaraan oleh pengerusi dan pengarahnya, Datuk Lim Kheng Kim, yang mengaku salah kepada semua dakwaan. Pembuat petiyen telah didapati bersalah dan didenda dan Datuk Lim telah membayar denda itu. Majistret juga mengarahkan pembuat petisyen membayar jumlah $265,069 iaitu bahagian sumbangan pekerja-pekerja sebelum 15 September 1986 dan sumbangan majikan sebanyak $985,795 melalui 12 bayaran ansuran bulanan. Sebahagian daripada jumlah ini telah dibayar dan pegawai pendakwa memohon untuk Datuk Lim dipenjarakan kerana menghina mahkamah. Majistret telah memutuskan bahawa Datuk Lim secara sendiri wajib membayar sumbangan yang belum diselesaikan. Pembuat petisyen dalam permohonan ini memohon supaya perintah majistret itu disemak.

Diputuskan, meluluskan permohonan pembuat petisyen dan mengenepikan perintah majistret:

Mengikut keadaan kes ini, Datuk Lim termasuk dalam s 18(2) Akta itu dan disifatkan bersalah. Dalam kes ini, majistret tidak menerangkan akibat s 18(2) kepada Datuk Lim dan beliau juga tidak diberi peluang untuk membuktikan kepada majistret bahawa kesalahan yang ia telah didapati bersalah telah dilakukan tanpa persetujuannya atau beliau telah gagal bertindak dengan tekun untuk menghalangnya. Perhatian majistret tidak ditarik kepada kesan syarat terdahulu seksyen ini.]

Case referred to
1 *R* v *Grubb* [1915] 2 KB 683 (refd)

Legislation referred to
Employees Provident Fund Act 1951 ss 16A(1)(c), A(4), 18(2)

V Sithambaram (*Choo Hon Choy* with him) for the petitioner.
Anslam Fernandes for the Public Prosecutor.

Cur Adv Vult

Mohamed Dzaiddin J: This was an application made by the petitioner to me to call for and examine the record of proceedings in Penang Fourth Magistrate's Court Summons No S(J) 979 of 1985 for the purpose of satisfying myself, as to the correctness, legality or propriety of the finding of the learned magistrate made on 15 April 1987 whereby he ordered Datuk Lim Kheng Kim to be personally liable for the payment of the Employees Provident Fund contributions due and owing by the petitioner to the Employees Provident Fund ('the Fund') under the Employees Provident Fund Act 1951 ('the Act').

Briefly, the facts of the case were these. On 31 July 1985, the petitioner was charged in the magistrate's court for 18 charges for an offence under s 16A(1)(c) of the Act, which is, being an employer, it failed to pay to the Fund the amount which it was liable under the Act to pay in respect of the employees' contributions. Apparently, the petitioner was represented at the hearing by its chairman/director, Datuk Lim Kheng Kim, who on 14 July 1986 pleaded guilty to all the charges. The petitioner was convicted and fined $150 or in default two months' imprisonment on each charge. Datuk Lim paid the fine. The magistrate further ordered the petitioner to pay a sum of $265,069 being the employees' share of contribution before 15 September 1986 and the employer's contribution for $985,795 by 12 monthly instalments commencing from 15 October 1986 until full payment. In the meantime, on 24 September 1986, the petitioner was placed under receivership by Malayan Banking Bhd under the debentures executed sometime in 1976 and 1986.

Then, on 20 October 1986, the court was informed that a sum of $65,069 out of the amount due as the employees' share of contribution had been paid to the fund. It was at this hearing that the prosecuting officer

had asked the court to order Datuk Lim to show cause why he should not be committed to prison for failure to settle the outstanding contributions which were recoverable as fine under s 16A(4) of the Act. The magistrate was then informed that Datuk Lim was making arrangement to obtain an overdraft facility of $200,000 from Bank Bumiputra Malaysia Bhd to enable him to settle the outstanding amount. He then granted an adjournment of four months to enable Datuk Lim to pay the balance of the contributions. When the case resumed on 4 March 1987, the prosecuting officer informed the court that Datuk Lim had still defaulted and urged the magistrate to send him to prison for contempt of court. After hearing arguments of counsel, the magistrate delivered his decision on 15 April 1987, when he held that Datuk Lim was the proper defendant in these summons and was personally liable to pay the outstanding contributions. However, he made no order to commit Datuk Lim to prison.

The crucial issue in this application is whether Datuk Lim Kheng Kim can be made personally liable for an offence under s 16A(1)(c) committed by the petitioner, as an employer?

After hearing the submissions of counsel and the deputy public prosecutor, and considering the authorities, in my opinion Datuk Lim cannot be made personally liable for the offence committed by the petitioner. First, it is not disputed that Datuk Lim was present at the magistrate's court in the capacity of chairman/director of the petitioner. He pleaded guilty to all the 18 charges for an offence under s 16A1(c) of the Act. At the later proceedings, he appealed through counsel for time to pay by instalments the arrears of the contributions and after being given the indulgence by the court defaulted in settling the arrears. Thus upon these facts, Datuk Lim certainly comes within the provision of s 18(2) of the Act and is deemed to be guilty of the offence.

Section 18(2) states:

> *Where an offence under this Act* or any regulation or rule thereunder *has been committed by a body corporate,* firm, society or other body of persons, *any person who at the time of the commission of the offence was a director,* manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity *shall, as well as such body corporate,* firm, society or other body of persons *be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.* (The emphasis is mine.)

Clearly, the above section makes a director, manager, secretary or other similar officer of a body corporate, as well as the body corporate, guilty of any offence under the Act unless it can be proved that the offence was committed without the consent or connivance of, or to be attributable to any neglect on the part of the director, manager, secretary or other similar officer of the body corporate. However, in the present case, I am satisfied that Datuk Lim was never explained by the magistrate the effect of s 18(2) nor was he given any opportunity to prove to the magistrate that the offence for which he had pleaded guilty was committed without his consent or connivance or that he had failed to exercise his diligence to prevent its commission. I am also quite sure that the attention of the magistrate was not drawn to the effect of the condition precedent of this section. In the circumstances, it was wrong for the magistrate to make him personally liable for the offence committed by the company.

In passing, I must state here that I agree with the submission of the learned deputy regarding the effect of s 16A(1)(c) on an employer who is a natural person. The section provides that an employer shall, on conviction, be liable to a fine or to imprisonment. It is trite law that no body corporate can be indicted for a crime where the only punishment is imprisonment (see *R* v *Grubb*[1]). However, where the offence prescribes a punishment with either a fine or imprisonment, the company which is a body corporate will be represented by a natural person who is either a director, manager, secretary or Officer of the Company. Therefore, reading s 16A(1)(c) together with s 18(2), I am of opinion that a director of a company can be made personally liable for the offence committed by the company unless he proves that it was committed without his consent or connivance etc.

Accordingly, in the exercise of the powers conferred under the Criminal Procedure Code, I grant the petitioner's application and direct that the order of the magistrate dated 15 April 1987 against Datuk Lim Kheng Kim personally be set aside.

Application allowed.

Solicitors: *Ooi, Lee & Co.*

Reported by *Zarinah Marican*